IN THE

SUPREME COURT OF THE UNITED STATES

No. 89-1324 (5)

GANNETT CO., INC.,
Petitioner

v.

STATE OF DELAWARE AND STEVEN B. PENNELL,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITIONER'S REPLY MEMORANDUM

Richard G. Elliott, Jr.
(of record)
David L. Finger
RICHARDS, LAYTON & FINGER
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
(302) 658-6541
Counsel for Petitioner
Gannett Co., Inc.

April 17, 1990

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTIONS PRESENTED

1. Whether the suppression by a trial court of the names of jurors in a criminal trial, absent a showing of necessity, *to wit*: (i) a substantial probability of a threat to a compelling State interest, (ii) the absence of less restrictive alternatives, and (iii) a narrowly drawn order which effectively prevents against the threatened harm, conflicts with the decisions of this Honorable Court establishing a right of access under the First Amendment to criminal proceedings.

2. Whether the public has a right under the First Amendment to hear the names of jurors in a criminal case announced in open court during the *voir dire* proceeding such that public announcement cannot be suppressed absent a showing on the record of necessity.

LIST OF PARTIES

The parties to the proceeding below were Petitioner Gannett Co., Inc.,[1] and Respondents the State of Delaware and Steven B. Pennell. The Reporter's Committee for Freedom of the Press, the American Society of Newspaper Editors, the Maryland-Delaware-District of Columbia Press Association, the National Newspaper Association and the Society of Professional Journalists, were granted permission by the Supreme Court of the State of Delaware to file a joint *amicus curiae* brief in support of Petitioner.

1. Gannett Co., Inc. has no parent corporation and no non-wholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS—*(Continued)*

IN THE

SUPREME COURT OF THE UNITED STATES

No. 89-1324

GANNETT CO., INC

Petitioner

v.

STATE OF DELAWARE AND STEVEN B. PENNELL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITIONER'S REPLY MEMORANDUM

Petitioner Gannett Co., Inc. respectfully submits this memorandum in reply to the Briefs in Opposition of Respondents the State of Delaware (the "State") and Steven B. Pennell ("Pennell").

REASONS FOR GRANTING THE WRIT.

Jury service is the principal means by which the people participate in the judicial branch of government. The jury brings the public's values and sensibilities to bear upon the problems of justice, and guards "against the exercise of arbitrary power — to make available the

commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). The decision of the Delaware Supreme Court destroys the idea of jurors as representatives of the public. By cloaking jurors in anonymity, the bond between the jury and the public is weakened. That bond is sealed by the public's participation in the jury selection process. Hearing the name of each juror called and relating that name to the juror's *voir dire* testimony insures public confidence that the process is fair and the answers are truthful.

As jurors' names are traditionally announced during the jury selection process, access to their names is protected under *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"). As jurors' names were presumptively public both under English and American law, and as public access to those names serves a significant positive role in ensuring both the fairness and the appearance of fairness of a criminal trial, the public's right of access to jurors' names is protected by the First Amendment.

The decision of the Delaware Supreme Court conflicts with this Honorable Court's holding in *Press-Enterprise I*, which found that experience and logic mandate that the *voir dire* process, including the information derived therefrom, must be accessible to the public absent record evidence demonstrating a substantial probability of a threat to a compelling State interest. Moreover, the decision should be reviewed because it destroys the public's ability to learn who is sitting in judgment, and who may decide the life and death of a criminal defendant. Finally, the decision should be reviewed because, as the dissenters noted, the decision

"constitutes a subtle yet troubling intrusion [by the Court] into the editorial policies of the press." (Pet. Sup. at A-34).[2]

Respondents, confronted with these substantial and compelling reasons why a writ of certiorari should be granted, attempt to deflect the important issues by introducing irrelevant points, some of which were not properly addressed in the proceedings below. They introduce new theories in a desperate attempt to re-cast the issues decided by the Delaware Supreme Court.

In its three-to-two decision, the Delaware Supreme Court held that (1) suppression by a trial court of the announcement of jurors' names during a criminal *voir dire*, without any evidence of a substantial threat to a compelling State interest, is not contrary to the principles established in *Press-Enterprise I*, and (2) there is no right under the First Amendment to know the identities of jurors in a criminal case. *Gannett Co., Inc. v. State of Delaware v. Steven B. Pennell*, No. 372, 1989 (Del. Feb. 22, 1990). It is these two important and substantial issues that Petitioner seeks to have reviewed by this Honorable Court.

A. The Decision Of The Delaware Supreme Court Conflicts With This Honorable Court's Decision In *Press-Enterprise I*.

In Press-Enterprise I, this Honorable Court held that a right of access to a criminal *voir dire* exists under the First Amendment, as jury selection has historically been public and openness serves First Amendment values. 464 U.S. at 505-510. That opinion stated that

---

2. The Petition is cited herein as "Pet. at ." The Supplemental Brief In Support Of The Petition is cited herein as "Pet. Sup. at ." The Brief In Opposition of Pennell is cited herein as "Pen. at ". The Brief In Opposition of the State is cited herein as "St. at ."

openness serves the beneficial purpose of giving "assurance that established procedures are being followed and that deviations will become known." *Id.* at 508. In response, Pennell repeats the holding of the majority opinion of the Delaware Supreme Court that *Press-Enterprise I* is not implicated because the *voir dire* was otherwise open to the public. (*See* Pen. at 13-14). As the dissent noted, however, "the issue does not turn on logistics. The primary concern of *Press-Enterprise I* and related cases is minimizing secrecy in criminal proceedings. Anonymity is the very essence of secrecy." (Pet. Sup. at A-37).

The artificiality of Pennell's position is made apparent by a case cited in the Petition which Respondents have failed to address, *In re Memphis Publishing Co.*, 887 F.2d 646 (6th Cir. 1989). In that case, the Sixth Circuit found a violation of *Press-Enterprise I*, notwithstanding that the public could and did attend the *voir dire*, because the lower court used a device to prevent the public from hearing some of the information elicited at that *voir dire*. In the present action, the trial court similarly suppressed information normally made public at the *voir dire*, *i.e.*, the identity of the jurors. Thus, the opinion of the Delaware Supreme Court conflicts not only with *Press- Enterprise I*, but also with the decision of the Sixth Circuit. Pennell's brief fails to demonstrate any basis for concluding to the contrary.[3]

---

3. Respondents attempt to deflect attention from this obvious conflict by arguing for the first time that the decision of the Delaware Supreme Court is justifiable as a "time, place and manner" restriction. (St. at 13-14; Pen. at 4). Initially, it should be noted that this standard has never been applied in an access case. Moreover, to apply this standard, the regulation must be content neutral. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986), *reh. denied*, 475 U.S. 1132 (1986). As the decision of the of the Delaware Supreme Court allows suppression of specific information, with no certain opportunity to obtain that information, even at a later date, the decision is not content neutral.

Even assuming, *arguendo*, that a "time, place and manner"

The decision of the Delaware Supreme Court constitutes an unwarranted and improper erosion of the rights of the public enunciated in *Press-Enterprise I*. Until this Court addresses the issue, the citizens of the United States will be denied the important right to know who may decide the guilt or innocence, the life or death of a criminal defendant, based only upon a trial court's uninformed speculation.

B. Whether There Is A Public Right Of Access Under The First Amendment To The Identity Of Jurors In A Criminal Case Is An Important Issue Which Should Be Decided By This Court.

Petitioners maintain that the circumstances of this case are substantially identical to those in *Press-Enterprise I* because the right to know the identity of those answering *voir dire* questions is co-extensive with the right to hear the answers to the voir dire questions. However, assuming, *arguendo*, that *Press-Enterprise I* is not directly applicable, the issue decided by the Delaware Supreme Court, whether there is a right under the First Amendment to know the identity of jurors in a criminal trial, is an important issue of constitutional law which should be decided by this Honorable Court.[4]

Both Pennell and the State, recognizing this important constitutional issue, attempt to dilute its impact by suggesting that the trial court's decision was not a

---

analysis were proper, the decision of the Delaware Supreme Court would be incorrect. Under the Respondents' standard, and assuming that the information were to be released at a later date, such delay is permissible only if it "will not substantially undermine the public's ability to monitor the administration of justice." (St. at 14). Post-trial release eliminates the public's ability to monitor the jury selection process. Thus, Respondents' theory is insupportable.

4. By arguing in their briefs that a "time, place and manner" analysis applies, Respondents appear to concede that the First Amendment applies to the issues in this case.

resolution "to keep the names of jurors confidential forever" (Pen. at 19), and that any harm could be mitigated by post-trial release of jurors' names. (Pen. at 19; St. at 13-15). The State now argues that the public has a right of access to the names of jurors post-trial. (St. at 2). The State did not argue this position in the proceedings below. Indeed, the State's motion to "clarify" the Delaware Supreme Court's opinion so as to incorporate this new position was held to be "manifestly improper." (A-1).[5] As such, this position is not properly before this Honorable Court and should not be considered. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).[6]

In suggesting that post-trial access to jurors' names mitigates the harm caused by anonymity during the trial, Respondents demonstrate a lack of understanding regarding the beneficial purpose that is served by public announcement of jurors' names. By announcing jurors' names in open court during the *voir dire*, the public is able to participate in ensuring the fairness and impartiality of the jury panel, as members of the public who know the jurors can inform the court of any discrepancies or omissions in their *voir dire* testimony relevant to the jurors' capacity to serve. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596-597 (1980) (Brennan, J., concurring) (noting that public access encourages truthful testimony). *See also* Pet. Sup. at A-48-53.

---

5. The Order of the Delaware Supreme Court denying the motion for clarification is reprinted in the Appendix hereto.

6. The State's new position is not supported by the trial court's post-trial ruling, which held that the trial court "has the power in appropriate cases to withhold jurors' names post-verdict." (Pen. at A-17). The trial court held that the appropriate measure was to release the names of the jurors without their corresponding numbers (Pen. at A-18), thereby permanently divorcing the jurors from their *voir dire* testimony.

Contrary to the State's assertion, jurors' names are not like "trial exhibits." (St. at 13). Jurors are integral participants whose impartiality and veracity are essential to the judicial process. Public knowledge of their identities is important in ensuring that impartiality and veracity. The significant positive functions served by public access before and during trial are thwarted by waiting until after the trial to release the names. For example, if an anonymous jury aquits a defendant, and then after the trial it is discovered that some of the jurors had biases in favor of the defendant which went undetected at the *voir dire*, there can be no retrial because double jeopardy will have attached. *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 306 (1984). Conversely, if a criminal defendant is found guilty and jailed, and then at some indefinite time in the future the names of the jurors are revealed, and it turns out that the verdict was tainted, that criminal defendant will have spent time in prison unnecessarily. Thus, Respondents' new found theory of post-trial access is insupportable, in addition to being improperly presented.

C. The Case Law Provides No Support For Respondents' Position.

Cases cited by Respondents offer no support for their position. The State attempts to suggest that this case is akin to the situation presented in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), where the media engaged in inflammatory, prejudicial publicity. (*See* St. at 5 n.1). There is nothing in the record to suggest that the pre-trial publicity in this case was anything but balanced, fair and objective. As the dissenters noted, "there is no evidence, and it has not been suggested, that the

press has engaged in the egregious attempt to prejudice public opinion that was present in *Sheppard*." (Pet. Sup. at A-57).[7]

The State also cites *United States v. Doherty*, 675 F. Supp. 719 (D. Mass. 1987), to suggest that the right of a trial court to suppress the names of jurors is "undoubted." (*See* St. at 15). The issue in that case was whether a court could take actions preventing the media from interviewing willing jurors after a trial. Suppression of jurors' names prior to the end of trial was not at issue. The quoted language in *Doherty* appears in a footnote, *id.* at 722 n.4, unsupported by any authority or reasoning. As such it is pure *dicta*.[8]

United States v. Edwards, 823 F.2d 111 (5th Cir. 1987), *cert. denied sub nom. Times-Picayune Publishing Corp. v. Edwards*, 485 U.S. 934 (1988), involved a denial of access to a transcript of a mid-trial *voir dire*, which, unlike the *voir dire* for selecting jurors, was not historically open. The issue did not involve the jurors' names. Indeed, it appears that the names of the jurors in *Edwards* were already part of the public record.

Finally, *United States v. Scarfo*, 850 F.2d 1015 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 263 (1988), cited by Pennell (Pen. at 16), involved a criminal defendant's claim that keeping the names of the jurors anonymous (including from him) violated his Sixth Amendment right to a fair trial. The Court did not consider any First

---

7. Contrary to the inferences of the Respondents, there is no evidence that any jurors were harassed in the *Joyce L. Lynch* trial, or in any other trial in Delaware. Further, the transcript of why one juror in the Lynch case was excused was not known to the trial court until after Pennell's trial was concluded.

8. A companion case, *United States v. Doherty*, 675 F. Supp. 712 (D. Mass. 1987), provides evidence that extra security measures, including sequestration of the jurors, was necessary because of the presence of a witness who was admitted to the Federal Witness Protection Program. *Id.* at 713. This opinion demonstrates that there may have been a compelling State interest which would justify suppression of the jurors' names.

Amendment concerns. The fact that the Court found that there was no Sixth Amendment right to the names does not lead to the conclusion that there is no such First Amendment right. *Compare Gannett Co. Inc. v. DePasquale*, 443 U.S. 368 (1979) *with Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (public has no Sixth Amendment right to attend trial, but does have a First Amendment right).[9]

* * *

The decision of the Delaware Supreme Court removes from First Amendment protection the public's right to participate in ensuring the impartiality of jurors in criminal trials. Based upon whim or speculation, the trial court can impanel an anonymous jury. The decision increases the risk that biases of jurors will go undetected, as jurors realize that their *voir dire* testimony is no longer subject to independent verification by people who know them. The decision opens the door to future rulings further eroding the constitutional right of access by creating artificial and illogical distinctions. To halt this improper erosion of First Amendment rights, and to set the parameters by which courts can properly analyze claims of rights of access, this Honorable Court should grant the petition for a writ of certiorari.

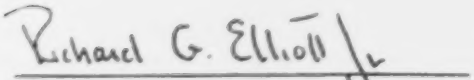
---

9. Courts have indicated that the Sixth Amendment limits the power of judges to impanel anonymous juries to situations where there is evidence on the record that the defendant or his associates pose a threat to the judicial process. In the absence of any such evidence, courts decline to impanel an anonymous jury. *E.g., United States v. Coonan*, 664 F. Supp. 861, 862 (S.D.N.Y. 1987), *decision adhered to*, 671 F. Supp. 959 (S.D.N.Y. 1987). Thus, it appears that there are limitations on the right of judges to suppress the names of jurors.

CONCLUSION

For the foregoing reasons, this Honorable Court should issue a writ of certiorari to review the judgment and opinion of the Delaware Supreme Court.

Respectfully submitted,



Richard G. Elliott, Jr.
(of record)
David L. Finger
Richards, Layton & Finger
One Rodney Square
P. O. Box 551
Wilmington, DE 19899
(302) 658-6541

Counsel for Petitioner
Gannett Co., Inc.

April 17, 1990

APPENDIX

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GANNETT CO., INC.	:	
	:	
Intervenor Below, Appellant,	:	
	:	
v.	:	No. 372, 1989
	:	
STATE OF DELAWARE,	:	Court Below: Superior Court of the State of Delaware in and for New Castle County in Cr.A. Nos. N88-12-0051 thru 0053.
	:	
Plaintiff Below, Appellee,	:	
	:	
v.	:	
	:	
STEVEN B. PENNELL,	:	
	:	
Defendant Below, Appellee.	:	

Before Moore and Holland, Justices, and Hartnett, Vice Chancellor, (sitting in designation pursuant to Del. Const. art. IV, §12).

ORDER

This 7th day of March, 1990, it appearing that:

1) The State has addressed a motion to the majority, allegedly seeking "clarification" of the majority's opinion in this matter.

2) The motion with accompanying correspondence attempts to argue matters not raised by or relied upon by the State before this Court, and which are contrary to the positions taken by the State in this Court. Accordingly, the motion will be denied as manifestly improper.

3) Chief Justice Christie and Justice Walsh, having dissented from the majority opinion, take no position on the matter.

NOW, THEREFORE, IT IS ORDERED that the State's motion be, and the same hereby is, **DENIED.**

BY THE COURT:

Justice